IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

MEMORANDUM OF LAW REGARDING DEFENDANT'S MOTION TO PROCEED *PRO SE* AND STATUS OF COUNSEL[1]

On April 22, 2002, the defendant, Zacarias Moussaoui, asserting a belief that counsel were in a conspiracy with the government to kill him, moved to waive his right to court-appointed counsel and to represent himself. Although ambiguous in his request, Mr. Moussaoui did make it clear that he did not want current counsel to remain involved in his defense, even as standby counsel, although he does seem to want standby counsel of his own choosing. (Tr. at 4, 18, 62-63.)[2]

The Court ordered a psychiatric exam to help determine whether the attempted waiver was knowing and voluntary. (Tr. at 48-50, 53-54, Order dated April 22, 2002.) The request to proceed *pro se*, if granted, would bring with it harm to the defendant of ultimate consequence. Further, there remains significant doubt with regard to the defendant's mental competence which has not yet been definitively resolved notwithstanding Dr. Patterson's most current report dated June 7, 2002. Accordingly, ruling on the counsel waiver is premature. Finally, we set forth herein the factual circumstances and counsel's view of the law that the Court should consider before acting on the

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[1] We are providing an unredacted copy of this memorandum to the government because we understand that the Court has already released an unredacted copy of Dr. Patterson's June 7, 2002 report to the government. We would have requested that the Patterson Report be redacted to eliminate Mr. Moussaoui's statements and other confidential information and we would have redacted this in turn.

[2] Unless otherwise noted, transcript references are to the transcript of the April 22, 2002 hearing.

defendant's motion to waive counsel and proceed *pro se* including the status of Mr. Moussaoui's current counsel in any future proceedings.

BACKGROUND

The Indictment in this case was returned on December 11, 2001. It charges Mr. Moussaoui with six (6) felonies, four of which carry the death penalty.[3] The government has filed a notice of intent to seek his death.[4] Mr. Moussaoui has been in custody since August 16, 2001, and has been in solitary confinement since September 11, 2001. He was transferred from New York to Virginia following his indictment in this district and has been held in the Alexandria Detention Center ("ADC") since that time.

When Mr. Moussaoui was arraigned on January 2, 2002, he refused to enter a plea, instead stating, "In the name of Allah, I do not have anything to plea, and I enter no plea." (Jan. 2, 2002 Tr. at 4.) The Court later described Mr. Moussaoui's conduct as "unorthodox and unpredictable" in support of a decision by the Court to deny television coverage of the trial. (Memorandum Opinion

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[3] Conspiracy to Commit Acts of Terrorism Transcending National Boundaries (18 U.S.C. § 2332b(a)(2), (c) (Count One)); Conspiracy to Commit Aircraft Piracy (49 U.S.C. § 46502(a)(1)(A), (a)(2)(B) (Count Two)); Conspiracy to Destroy Aircraft (18 U.S.C. §§ 32(a)(7) and 34) (Count Three)); Conspiracy to Use Weapons of Mass Destruction (18 U.S.C. § 2332a(a) (Count Four)); Conspiracy to Murder United States Employees (18 U.S.C. §§ 1114 and 1117) (Count Five)); and Conspiracy to Destroy Property (18 U.S.C. § 844(f), (i), (n) (Count Six)).

[4] The parties have briefed the issues regarding the legitimacy of the government's notice of intent to seek the death penalty. Resolution of the challenge to death eligibility in this case could dramatically change the severity of the consequences of Mr. Moussaoui's *pro se* request. Since it is purely a question of law, this issue could be argued outside Mr. Moussaoui's presence. *See* Fed. R. Crim. P. 43(c)(3) ("A defendant need not be present . . . when the proceeding involves only a conference or hearing on a question of law . . . ."). *See also Kentucky v. Stincer*, 482 U.S. 730 (1987) (holding that it was not error to exclude the defendant from a . . . hearing where his absence did not interfere with his opportunity for effective cross-examination); *Terry v. Cross*, 112 F. Supp. 2d 543, 551 (E.D. Va. 2000) (Ellis, J.) ("[T]his right [to be present at trial] has not been extended to include a right to be present at all motions hearings before the trial or after the verdict . . . . The critical question is not whether the accused would have avoided conviction by his presence, 'but whether the [accused's] presence at the proceeding would have contributed to the [accused's] opportunity to defend himself against the charges.") (alteration in original) (citations omitted).

dated Jan. 18, 2002 at 12.) The case was certified as "complex" under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, largely because discovery material will include a large quantity of classified information. Accordingly, hearings under the Classified Information Procedures Act, 18 U.S.C. app. III, were set for August 15 and September 5, 2002.

Shortly after arraignment, the government imposed Special Administrative Measures ("SAM") governing Mr. Moussaoui's condition of confinement. The SAM basically continued Mr. Moussaoui's pre-trial detention solitary confinement, shutting him off from the outside world except for his attorneys and immediate family.[5] Mr. Moussaoui cannot initiate or receive phone calls or mail from any other third parties.[6] On January 23, 2002, Mr. Moussaoui was moved to a different cell which was much smaller than the one that he had been held in at the ADC since his arrival in Virginia in December, 2001. Counsel's observations are to the effect that these conditions, over time, and particularly after the move to the more restrictive cell environment, began to weigh on Mr. Moussaoui, affecting his mental state.

On April 22, 2002, there was a hearing before the Court. At the outset, Mr. Moussaoui asked for recognition from the Court and when this was granted, moved to discharge his lawyers and proceed *pro se*. (Tr. at 1-2.) However, Mr. Moussaoui's desire to proceed without counsel was not absolute because he also wanted the assistance of a Muslim lawyer who he would select and hire to advise on matters of procedure. (Tr. at 4, 62-63.) During this hearing, Mr. Moussaoui alleged that his lawyers were in a conspiracy with the government to kill him (Tr. at 5-8), and linked the Court

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[5] His family contacts must be monitored by the government.

[6] Third parties who are part of the defense team, *e.g.*, expert witnesses, may talk to Mr. Moussaoui in counsel's presence on the phone, but the person must first be "vetted" by the FBI.

into the conspiracy (Tr. at 7-8).[7] Later, at the same hearing, Mr. Moussaoui tried to waive trial by jury and seek a trial before the judge whom he had just accused of being in the conspiracy to kill him. (Tr. at 59.) Mr. Moussaoui said that the motion his counsel had filed that resulted in the April 22, 2002 hearing was just a ruse by him to get into court so he could request the right to proceed *pro se* and that he was actually not interested in any of the relief requested by the motion itself. (Tr. at 18, 43-46.)[8]

After observing his performance in open court and making inquiry with defense counsel, the Court ordered a psychiatric evaluation to assist the Court in determining whether Mr. Moussaoui's waiver of his right to counsel was knowing, intelligent, voluntary and uncoerced. (Tr. at 48-50, 53-54.) In this regard, the Court, by order of April 26, 2002, appointed Dr. Raymond Patterson, a psychiatrist nominated by the government, to conduct the evaluation.

Immediately following the April 22, 2002 hearing, Mr. Moussaoui filed numerous papers with the Court. In his report, Dr. Patterson characterizes these papers as "well researched." (May 23, 2002 Report at 21.)[9] Two very experienced mental health experts retained by defense counsel

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[7] Ironic in all of this is that the government's refusal to let Mr. Moussaoui speak under less than perfect, but nevertheless controlled circumstances, with an Islamic consultant may have precipitated Mr. Moussaoui's unencumbered statement to the world. At least seven (7) times during Mr. Moussaoui's address to the Court, he lapsed into a language that the government claims sounded like Arabic.

[8] **[REDACTED]**

To engage in such an elaborate, unnecessary ruse, which he said he was carrying out from March 27, 2002 through April 22, 2002, seems so bizarre that it suggests that he could be suffering something akin to the affliction of John Nash depicted by Russell Crowe in the movie, "A Beautiful Mind." Mr. Nash, a Nobel prize winner, was suffering from debilitating paranoid schizophrenia. Because he was such a genius, his illness was difficult to recognize by those around him. Mr. Moussaoui's high intellect has much the same effect here.

[9] **[REDACTED]**

found different significance in the writings, finding, among other things, that many of them "appear relatively fragmented and disorganized with multiple digressions and conspicuous logical inconsistencies." (May 31, 2002 Report at 15.)

Dr. Patterson endeavored to see Mr. Moussaoui at the ADC on May 8 and 10, 2002. Mr. Moussaoui declined to see him. The Court entered another Order on May 15, 2002, suggesting that Mr. Moussaoui's refusal to see Dr. Patterson might itself be indicative of a mental health problem and suggested that a ninety-day evaluation at FCC Butner might be in order if Mr. Moussaoui did not cooperate with Dr. Patterson's efforts. In that Order, Mr. Moussaoui was "advised" to cooperate with Dr. Patterson, who, thereafter, endeavored to see him on May 18 and 22, 2002. Ultimately, no examination occurred by the time Dr. Patterson's report was filed on May 29, 2002.

In sum, Dr. Patterson's May 29, 2002 report concluded that Mr. Moussaoui's "defiance of the court's orders does not appear to be based in mental illness, but without the cooperation of the defendant in a full psychiatric examination, the question of mental disease or defect cannot be fully and directly addressed." (May 23, 2002 Report at 21.) The two experts retained by defense counsel, based on essentially the same information made available to Dr. Patterson, concluded "to a reasonable degree of professional certainty that notwithstanding Dr. Patterson's observations and descriptions of the defendant, there is a compelling and reasonable basis for continuing concern that Mr. Moussaoui's decision to waive his right to counsel may be the product of a mental disease or defect rendering the decision involuntary or without a knowing appreciation of its consequences." (May 31, 2002 Report at 15.)

Striking, when Dr. Patterson's initial report is compared with the report of defense experts, are the differences in the accounts of interviews conducted with Messrs. Dunham and Zerkin. (*Cf.* May 23, 2002 Report at 14-17 and May 31, 2002 Report at 6-9.) Counsel endeavored to provide the same information to Dr. Patterson as well as the experts retained by defense counsel. Yet, counsel must have done a better job of describing the relationship with Mr. Moussaoui to those doctors because their May 31, 2002 report accurately captures the essence of counsels' relationship with Mr. Moussaoui while Dr. Patterson's report does not. Dr. Patterson's report also glosses over a highly relevant family history of mental illness. *See* May 31, 2002 Report at 12-13.

Dr. Patterson's June 7, 2002 report concludes that Mr. Moussaoui is knowingly and voluntarily waiving his right to counsel and that the waiver is not the product of mental illness. (June 7, 2002 Report at 10.) Dr. Patterson reaches this conclusion after a two-hour interview of Mr. Moussaoui in which he "continued to refuse to answer certain questions on the mental status examination." (June 7, 2002 Report at 6.) Though Dr. Patterson found that Mr. Moussaoui did participate meaningfully in the interview, Mr. Moussaoui "did not want to address questions regarding his mental health functioning directly . . . ." (June 7, 2002 Report at 3.) In this regard, Dr. Patterson noted that Mr. Moussaoui "would not answer the question directly as to whether or not he had had hallucinations currently or in the past." (June 7, 2002 Report at 6-7.) Further, Dr. Patterson noted that Mr. Moussaoui "would not further discuss the content of this information [religious and political beliefs] so it is not possible to evaluate whether it is based on some delusional process or legitimate and verifiable basis." (June 7, 2002 Report at 7.) Finally, Dr. Patterson noted that Mr. Moussaoui "continues to be somewhat guarded regarding specific information . . . ." (June 7, 2002 Report at 7.) This can be hardly be described as "full cooperation" with a psychiatric

examination, which on May 29, 2002, Dr. Patterson said was *sine qua non* to fully addressing the question of mental disease or defect.

Dr. Patterson recognizes that "it is possible [interaction with his attorneys] is based in some fantasy or delusion . . . ." (June 7, 2002 Report at 7.) However, Dr. Patterson opines that it is instead the product of his political and religious belief systems. Though relying on his conclusion that Mr. Moussaoui's "beliefs are supported by his sub-culture," Dr. Patterson offers no evidence that persons of Mr. Moussaoui's "sub-culture" have acted similarly when facing serious criminal charges related to terrorism. (June 7, 2002 Report at 9.) To our knowledge, none of the terrorist defendants in previous U.S. trials (who were also of Mr. Moussaoui's subculture) have proceeded *pro se*.

Dr. Patterson's conclusion in his June 7, 2002 report that Mr. Moussaoui is competent to waive counsel on the basis of this two-hour meeting with Mr. Moussaoui during which he refused to answer a number of relevant questions, is inconsistent with that of his May 23, 2002 report that "without the cooperation of the defendant in a full psychiatric examination, the question of mental disease or defect cannot be fully and directly addressed." (May 29, 2002 Report at 21.)[10]

[10] Dr. Patterson also noted that Mr. Moussaoui is "awaiting feedback from a Muslim attorney he has seen." (June 7, 2002 Report at 9.) We note that the Court provided counsel a copy of a seven (7) page, one paragraph long letter dated June 5, 2002 from Bro. Freeman opining that "Bro. Moussaoui is wholly competent to decide whether he should proceed with a lawyer or *pro se* . . . ." (Freeman Letter at 1.) This rather unremarkable conclusion is made by a lawyer who saw Mr. Moussaoui for an hour and is in stark contrast with the conclusions of counsel who have met with Mr. Moussaoui in excess of fifty-five (55) times. It also is in conflict with the information provided by "Bro. Freeman" to counsel and as related in the report of experts retained by the defense. (May 31, 2002 Report at n.1.) Further, during a telephonic conversation with Frank Dunham, "Bro. Freeman" conceded he was not competent to render an opinion on this issue.

Given the timing of our receipt of Dr. Patterson's June 7, 2002 report (we received it mid-morning today), counsel anticipate providing a short supplemental report from experts retained by the defense as soon as possible.

I. THE *FARETTA* RIGHT

In *Faretta v. California*, 422 U.S. 806 (1975), the Court recognized a constitutional right (hereafter the "*Faretta* right") of an accused to act as his own counsel. To exercise the *Faretta* right, a defendant is required to make a knowing, voluntary, and intelligent waiver of the right to the assistance of counsel given the particular facts and circumstances of the case.[11] *Godinez v. Moran*, 509 U.S. 389, 400 (1993); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (court should consider totality of circumstances in considering a waiver of the right to counsel). As the Supreme Court observed in *Faretta*, "[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834 n. 46.

The right to self-representation "is not absolute, and 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.'" *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir.), *cert. denied*, 531 U.S. 994 (2000) (citation omitted).[12] In this case, because the right to counsel is the default position (see discussion of *United States v. Singleton*, 107 F.3d 1091 (4th Cir.), *cert. denied*, 522 U.S. 825 (1997) at pp. 12-13, *infra*), the defendant's *Faretta* right may be overridden by the substantial security

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[11] This right is also codified at 28 U.S.C. § 1654 (1994) ("[I]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . .").

[12] Out of 695 reported cases in which *Faretta* is not only cited but also editorially discussed, 133 involve decisions where the *Faretta* right was denied.

interests of the United States. (See Motion for Access by Defendant to Classified and Sensitive Discovery and for Relief from Special Administrative Measures Concerning Confinement filed contemporaneously herewith). There is no case of which we are aware in which a defendant has been allowed to proceed *pro se* wherein access to national security information is required.

There are also other reasons why the *Faretta* right has been denied. These include asserting it for an improper purpose,[13] timeliness, the waiver not being clear and unequivocal,[14] disruptive behavior,[15] language problems, and incompetence.[16] Even without the question of Mr. Moussaoui's mental competence looming as it does in this case, there are grounds in the current record to deny Mr. Moussaoui's request to proceed *pro se*.[17] In addition to the very serious issue of

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[13] *See, e.g.*, *United States v. Frazier-El*, 204 F.3d 553, 560 (4th Cir.), *cert. denied*, 531 U.S. 994 (2000) (defendant's insistence on representing himself so that he can assert a frivolous argument in his own defense was deemed sufficient to deny *Faretta* right as being asserted for an improper purpose).

[14] To assert the *Faretta* right, a defendant must clearly and unequivocally inform the Court that he wants to represent himself and does not want counsel. *United States v. Frazier-El*, 204 F.3d 553, 558 (4th Cir.), *cert. denied*, 531 U.S. 994 (2000); *see also, United States v. Hill*, 526 F.2d 1019, 1024 (10th Cir. 1975) (*Faretta* request denied because not clear and unambiguous since it was a request for hybrid counsel arrangement to which there is no right even if the co-counsel is retained), *cert. denied*, 425 U.S. 940 (1976); *Thomas v. Newland*, ___ F. Supp. ___, 1999 U.S. Dist. LEXIS 1393, at *16 (N.D. Cal. 1999) ("[A] defendant has no constitutional right 'to represent himself and have access to 'advisory' or 'consultive' counsel at trial.'") (quoting *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994).

[15] *See* note 19 *infra*.

[16] *United States v. Purnett*, 910 F.2d 51, 56 (2nd Cir. 1990) (where trial court has sufficient cause to doubt the competency of a defendant to make a knowing and intelligent waiver of the right to counsel, appointed counsel must continue until the competency issue is resolved); *United States v. Boigegrain*, 155 F.3d 1181, 1186 (10th Cir. 1998) (delay in dismissing public defender for six months until issue of competency resolved, particularly where delay was due in part to defendant's refusal to cooperate with psychiatrists, did not deny *Faretta* right because Court cannot simultaneously question mental competence and yet accept counsel waiver as knowing and intentional), *cert. denied*, 525 U.S. 1083 (1999).

[17] No conflicts counsel has been appointed. Accordingly, defense counsel are left in the awkward position of suggesting opposition to the client's request to fire them and proceed *pro se*. However because of concerns about the nature of this prosecution, the validity of Mr. Moussaoui's attempted waiver, including his mental state, reasons to deny the request are set forth herein. As noted later, it may well be appropriate for this Court to replace the current counsel.

Mr. Moussaoui's mental health, there are a variety of factors that could lead the Court to deny the *Faretta* right.

First, as found by Dr. Patterson, if Mr. Moussaoui is merely following his "political beliefs" in seeking to proceed *pro se*, he may well be attempting to use the forum of an open public trial to make a political statement. In this regard, the Court should consider the colloquy in *Frazier-El* and once competency is resolved, conduct an *ex parte* inquiry to determine whether the defense Mr. Moussaoui intends to offer in this case is sufficiently more legitimate and sincere than the defense advanced in *Frazier-El*.

Second, Mr. Moussaoui's request to proceed *pro se* is not clear and unequivocal as required by Fourth Circuit law. *See Frazier-El*, 204 F.3d at 558-59. While stating that he wants to represent himself, he nevertheless told the Court that he wants the assistance of a Muslim lawyer to advise him on procedure during the trial. (Tr. at 4, 62-63.) Further, when specifically asked by the Court if he wanted to fire his attorneys and proceed *pro se*, he answered, "no." (Tr. at 26.) He also said "no" when specifically asked whether he wanted "to hire . . . a Muslim attorney." (Tr. at 26.) Mr. Moussaoui also advised that "[i]f it will be proven to me that you will supply to me all the elements to prepare my own defense, I will reconsider your offer . . . [to proceed *pro se*]." (Tr. at 27.) These ambiguous and seemingly contradictory statements support a finding that Mr. Moussaoui's *pro se* assertion has not been made clearly and unequivocally.[18]

The Court could also conclude that the waiver is not clear and unequivocal because of Mr. Moussaoui's refusal to comply with the Court's requirement that he submit to a mental health

[18] What Mr. Moussaoui has made clear is that he does not want current counsel to represent him either as counsel or in a "stand by" capacity. (Tr. at 46, 63.)

evaluation. As the Court itself has noted, such a refusal "frust[rates] his own goal of representing himself." (Order dated May 15, 2002 at 2.) It is also evidence of the uncertainty of Mr. Moussaoui's *pro se* request. Mr. Moussaoui's subsequent decision to meet with Dr. Patterson does not change the fact that he previously refused to meet with Dr. Patterson four times although having been advised to do so. Further, this meeting cannot be described as cooperative because Mr. Moussaoui would not answer questions regarding his mental health functioning directly and withheld other information which would be relevant to Dr. Patterson's task.

Third, as Dr. Patterson notes in one of his recommendations, Mr. Moussaoui's refusal to follow the Court's orders may be an indication that he may also refuse to follow other Court-required mandates during the course of trial and he has not retracted this recommendation in his most recent report. (May 23, 2002 Report at 21.) Given this concern, and Mr. Moussaoui's writings after April 22, 2002, (which have included verbal attacks on the Court and counsel) which include a statement that he will not even read the Court's orders except insofar as they set a hearing date, the Court could reasonably project disruptive behavior at trial.[19] Indeed, when following the rules of the Court was discussed, Mr. Moussaoui said he would follow the rules of the Court, but continued to say that he would not follow anything that interferes with his religion. (June 7, 2002 Report at 3.)

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[19] While counsel believe this conduct is most likely the product of a serious mental illness, we note that the defendant's *pro se* right is circumscribed by the requirement that the defendant not disregard the dignity, order and decorum of judicial proceedings. *See, e.g., United States v. West*, 877 F.2d 281 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *United States v. King*, 582 F.2d 888, 890 (4th Cir. 1978); *United States v. Gallop*, 838 F.2d 105, 107-08 (4th Cir. 1988); *United States v. Ellerbe*, 172 F.3d 864, 1999 U.S. App. LEXIS 2049, *4 (4th Cir. 1999) (per curiam) (unpublished opinion, copy attached); *United States v. Rowley*, 155 F.3d 563, 1998 U.S. App. LEXIS 16993, *5 (4th Cir. 1998) (per curiam) (unpublished opinion, copy attached). The defendant's conduct to date, if volitional, certainly provides more than adequate bases to conclude that the defendant will not be able to comply with the requirements of proceeding *pro se.*

Finally, in the absence of proof that each of the conditions for waiver have been satisfied, or when there is doubt of such proof, the waiver of counsel should be rejected. This is due in part to the longstanding principle that "'courts [should] indulge every reasonable presumption against waiver' of fundamental constitutional rights,"[20] particularly the right to an attorney.[21]

The reticence to allow a defendant to proceed *pro se* is based on the recognition that the right to counsel is preeminent over the right to self-representation. As the Fourth Circuit has stated, "'[w]here the two rights are in collision, the nature of the two rights makes it reasonable to favor the right to counsel, which, if denied, leaves the average defendant helpless.'" *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir.) (quoting *Tuitt v. Fair*, 822 F.2d 166, 174 (1st Cir.), *cert. denied*, 484 U.S. 945 (1987)), *cert. denied*, 522 U.S. 825 (1997).

In *United States v. Singleton*, 107 F.3d 1091 (4th Cir.), *cert. denied*, 522 U.S. 825 (1997), which originated from the Eastern District of Virginia,[22] the Fourth Circuit Court of Appeals elaborated on the constitutional differences between the right to counsel and the right to self-representation:

> [R]epresentation by counsel does not merely tend to ensure justice for the individual criminal defendant, it marks the process as fair and legitimate, sustaining public confidence in the system and in

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[20] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (remanding to the trial court to determine whether the defendant validly waived his right to counsel) (citations omitted); *see also id*. at 464 ("[W]e 'do not presume acquiescence in the loss of fundamental rights.'") (citation omitted).

[21] *See Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir.) (en banc) ("So important is the right to counsel that the Supreme Court has instructed courts to 'indulge in every reasonable presumption against [its] waiver.'") (alteration in original) (citation omitted), *cert. denied sub nom.*, *Fields v. Angelone*, 516 U.S. 884 (1995). *Accord United States v. Farhad*, 190 F.3d 1097, 1099 (9th Cir. 1999) ("We approach this question [of waiver of the right to counsel] cautiously, indulging 'every reasonable presumption against waiver.'") (citation omitted), *cert. denied*, 529 U.S. 1023 (2000).

[22] Senior District Judge Albert V. Bryan, Jr. was the District Court judge.

> the rule of law. In this sense, the Sixth Amendment right to counsel serves important public purposes.
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> By contrast, the right to self-representation identified in *Faretta* is concerned primarily with individual rights. . . . [S]elf-representation champions individual freedom of choice. "The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense."
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> Because the right to counsel serves both individual and collective good, it is appropriate to ascribe it a constitutional primacy which the more individualistic right of self-representation does not command.

Id. at 1102 (citations omitted).

Given these differences, the Fourth Circuit in *Singleton* concluded, when the right to counsel and the right to self-representation collide, the former wins. That is, "[o]f the two rights . . . the right to counsel is preeminent and hence, the default position." *Singleton*, 107 F.3d at 1096.[23]

Based on *Singleton* and the other cases noted in footnote 23 herein, Mr. Moussaoui's request to represent himself should be denied if this Court has insufficient proof that the waiver is knowing, voluntary, and uncoerced or that he is competent to waive counsel. Further, Mr. Moussaoui's demand should be denied if that proof is equivocal, for the right of counsel is the "default position." *Singleton*, 107 F.3d at 1096. Thus, the Court was correct to note that Mr. Moussaoui's refusal to meet with Dr. Patterson will not help his position because the Court may not be able to determine

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[23] Other Fourth Circuit opinions are in accord. *See Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir.) (en banc) (stating "'[o]f the two [rights], the right to be represented by counsel is preeminent'" and finding no constitutional violation where the trial court refused to allow the defendant, who was represented by counsel, to personally cross-examine the minor girls who were alleging that the defendant had sexually assaulted them) (citation omitted), *cert. denied sub nom.*, *Fields v. Angelone*, 516 U.S. 884 (1995); *United States v. Gillis*, 773 F.2d 549, 559 (4th Cir. 1985) ("Of the [right to be represented by counsel and the right to present your own defense], the right to be represented by counsel is preeminent . . . .") (citations omitted). *Accord Tuitt v. Fair*, 822 F.2d 166, 177 (1st Cir.) (stating that "[t]he right to counsel is, in a sense, the paramount right; if wrongly denied, the defendant is likely to be more seriously injured than if denied his right to proceed pro se"), *cert. denied*, 484 U.S. 945 (1987).

whether the requisite elements for waiver have been satisfied. (*See* May 15, 2002 Order at 2; *see also* April 29, 2002 Order at 2) (denying the defendant's opposition to the mental health evaluation, and stating, "opposing the evaluation is inconsistent with the defendant's desire to represent himself because the Court will not be able to resolve the voluntariness of that decision without the evaluation."). Mr. Moussaoui's recent meeting with Dr. Patterson does not change this because he still failed to fully cooperate.

It was just such a situation that the Minnesota Supreme Court faced in *Minnesota v. Gissendanner*, 343 N.W.2d 668 (Minn. 1984), in which the defendant claimed that the trial court erred in refusing to let him represent himself. *Id*. at 669. In affirming the trial court's decision, the Minnesota Supreme Court explained that,

> The record on appeal in this case indicates that defendant refused to cooperate completely in a mental examination at [a facility]. A failure to *fully cooperate* in such an examination may be held against a defendant in determining whether he can make an intelligent decision to represent himself.

Id. (emphasis added).

For all of the above reasons, the Court would not err in denying Mr. Moussaoui his right to proceed *pro se*, and in so doing would no doubt preserve the only realistic chance he has to save his life.[24]

II. COMPETENCE AND MENTAL HEALTH CONSIDERATIONS

The concept of competency to stand trial and the ability to knowingly and voluntarily waive counsel are distinguished in *Godinez*. As the Supreme Court noted, the former focuses on "the

[24] We also note in another memorandum that granting Mr. Moussaoui's request to proceed *pro se* without also granting additional relief (in the form of relaxation of the SAM and access to sensitive/classified discovery information) will result in a denial of his due process rights to a fair trial.

defendant's mental capacity, [*i.e.*,] the question is whether he has the ability to understand the proceedings." 509 U.S. 389, 401 n.12 (emphasis in original). In contrast, the latter focuses on whether the defendant "actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Id.*

Accordingly, there are cases that have found a defendant competent to stand trial, but not competent to waive counsel due to mental illness. *See, e.g., Wilkins v. Bowersox*, 145 F.3d 1006, 1013 (8th Cir. 1998) (affirming the district court's grant of *habeas corpus* relief to a defendant who was competent to waive counsel, but whose waiver of counsel was not knowing, intelligent, and voluntary). This is particularly true when a defendant's decision making process regarding counsel is "coerced" by mental disease, defect or other mental condition that does not impact his capacity to understand the nature of the proceedings against him but which does interfere with his decision making regarding counsel.[25]

Initially, neither Dr. Patterson nor the experts retained by defense counsel could reach a definitive conclusion about whether or not Mr. Moussaoui is suffering from a mental illness which impairs his ability to make a knowing, voluntary, and uncoerced waiver of the right to counsel. However, two highly qualified mental health professionals have opined that "[t]here is considerable evidence that Mr. Moussaoui's thinking is dominated by irrational and unrealistic persecutory beliefs . . . . His judgment appears to be severely affected by his paranoid beliefs, and by his apparent tendency to experience fragmented, disorganized, and digressive forms of thought . . . . There is also

[25] Of course, a mental illness which interfered with decision-making regarding counsel could impair overall competency to stand trial. Thus, implicit in the competency issue with regard to a waiver of the right to counsel is the competency to stand trial question. Dr. Patterson's most recent report of June 7, 2002 states "there has not been any issue of Mr. Moussaoui's competence to proceed to trial raised by the parties . . . ," (June 7, 2002 Report at 9), but omits the fact that this is raised implicitly when the question of competency to waive counsel arises.

considerable evidence that he lacks insight into the manner in which his idiosyncratic behavior and unrealistic, irrational thinking affect his judgment, his relationships with counsel, or his position with the Court." (May 31, 2002 Report at 15.) Indeed, as noted earlier, these two experts opine that "notwithstanding Dr. Patterson's observations and descriptions . . . there is a *compelling and reasonable* basis for continuing concern that Mr. Moussaoui's decision to waive his right to counsel may be the product of a mental disease or defect rendering the decision involuntary or without a knowing appreciation of its consequences." *Id*. (emphasis added).

Dr. Patterson's meeting with Mr. Moussaoui does not alter our serious concerns regarding Mr. Moussaoui's mental competence. Dr. Patterson's report raises more questions than it answers and the defendant's refusal to fully cooperate leaves open even more questions.

On the state of this record, the Court should direct a more thorough evaluation of Mr. Moussaoui's mental state, as recommended by the two experts retained by defense counsel. Initially, this should consist of an order directing Mr. Moussaoui to cooperate with an examination conducted by the experts retained by the defense. After that evaluation is completed, should serious questions remain, the Court should not attempt any *Faretta*/waiver hearing, but should instead commit Mr. Moussaoui to the Mental Health Division at FCC Butner for examination of his mental competence to proceed.

The story told by Dr. Patterson is that Mr. Moussaoui's actions are based solely on his ideology. We disagree. There is more to the story than this. Mr. Moussaoui's ideology appears to be interlaced with serious psychopathology, the nature of which is unclear, but which is strongly manifest in the texture of counsel's interaction with him. Consequently, counsel have substantial doubts about his capacity to interact rationally with counsel and to make rational decisions about the

conduct and disposition of the case. Dr. Patterson has reached premature closure on the issue of Mr. Moussaoui's competence and has failed to give adequate attention to the texture of counsel's interactions with Mr. Moussaoui and their concerns about his rationality.

III. STATUS OF COUNSEL

It is most difficult to take positions, as counsel do here, which on their face contradict the stated positions of our client, particularly where, as here, the client alleges that counsel have a personal stake in remaining in the case other than devotion to the client's best interests. Counsel take the positions presented herein because we believe Mr. Moussaoui's beliefs concerning the motivations of his current counsel are most likely the product of a serious mental illness, that his endeavor to waive counsel is not knowing and voluntary because it is coerced by this mental state, and most importantly, that for Mr. Moussaoui to proceed without counsel could be fatal.

On the other hand, it would not be in the interests of justice, if Mr. Moussaoui is found to be competent to make an acceptable voluntary waiver of the right to counsel, to require him to proceed with counsel, even as standby, who he believes are trying to harm him, whether or not this belief is true. Further, if the Court determines that Mr. Moussaoui is competent to make a knowing, voluntary and uncoerced waiver of the right to counsel, then an irreconcilable conflict exists because there has been a total breakdown of communication with the client. *See e.g., United States v. Mullen*, 32 F.3d 891, 897 (4th Cir. 1994). Accordingly, in the event the Court finds that Mr. Moussaoui has made an acceptable waiver of the right to counsel, the undersigned respectfully request leave to withdraw.

Respectfully submitted,

/S/
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing (Redacted) Memorandum of Law Regarding Defendant's Motion to Proceed *Pro Se* and Status of Counsel was served by hand upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 11th day of June, 2002.

/S/
Frank W. Dunham, Jr.

LEXSEE 1998 U.S. App. LEXIS 16993

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DONTE MIGUEL ROWLEY, Defendant-Appellant.

No. 96-4137

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1998 U.S. App. LEXIS 16993

June 10, 1998, Submitted

July 24, 1998, Decided

NOTICE:
[*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY:
Reported in Table Case Format at: *1998 U.S. App. LEXIS 27408.*

PRIOR HISTORY:
Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert N. Maletz, Senior Judge, sitting by designation. (CR-94-358).

DISPOSITION:
AFFIRMED.

COUNSEL:
Anthony Bornstein, WASHINGTON COLLEGE OF LAW, Washington, D.C., for Appellant.

Lynne A. Battaglia, United States Attorney, Robert R. Harding, Assistant United States Attorney, Illene J. Nathan, Special Assistant United States Attorney, Baltimore, Maryland, for Appellee.

JUDGES:
Before WILKINS, HAMILTON, and MOTZ, Circuit Judges.

OPINION:

OPINION

PER CURIAM:

A jury convicted Donte Miguel Rowley of killing in furtherance of a drug conspiracy in violation of *21 U.S.C.A. § 848*(e) (West Supp. 1998) and he pled guilty to conspiracy to distribute and possess with intent to distribute cocaine in violation of *21 U.S.C. § 846* (1994). The court sentenced Rowley to life imprisonment [*2] and three hundred months, respectively. Rowley appeals his conviction and sentence alleging that the trial court's refusal to grant a mistrial and replace Rowley's attorney when he notified the court during the trial of his upcoming suspension from the Maryland Bar violated Rowley's Sixth Amendment right to counsel. Rowley further contends that the trial court's admission of certain propensity evidence violated Rowley's due process rights to a fair trial. Finding no reversible error, we affirm.

The evidence presented at trial disclosed that Donte Miguel Rowley was a leader in a crack distribution organization. Andre Robinson, the victim, worked within the organization. Upon receiving a call at approximately 2:00 a.m. on May 29, 1994, police went to Robinson's apartment and found Robinson dead with two gunshot wounds to the back of his head. The mattress in the bedroom had been ransacked. Police estimated the death to have occurred no more than one hour prior to their arrival.

Testimony was introduced that in 1993, a dispute developed between Rowley and Robinson over drug money. In a post-arrest statement Rowley admitted that he kept large amounts of cash in a "Charlie Rudo" bag in [*3] Robinson's apartment, which Rowley claimed was missing the day after the murder. A witness testified that he saw both Rowley and Robinson on the night of the murder at approximately 11:00 p.m. in front of Robinson's apartment. Some time after that he heard three gunshots and saw Rowley in front of the apartment. Silvester Taylor, a neighbor of Robinson, testified that at approximately 2:00 a.m. that night, as he was returning home, he heard gunshots from Robinson's apartment. As he peered out of his curtain window, he saw two males walk from Robinson's apartment and towards the parking lot. He testified that he believed one of the males was Rowley, whom he had

seen at Robinson's apartment several times in the past.

Taylor's seventeen-year-old stepdaughter, Melody McLeod, also testified that she had seen Rowley at Robinson's apartment on several occasions. The week prior to the murder she saw money in both the bedroom closet and under the mattress of Robinson's apartment. On the afternoon of May 28, 1994, McLeod observed Robinson, after talking with his mother on the phone, take a Charlie Rudo tennis shoe bag with a drawstring, go into the bedroom, come out with the bag packed with [*4] something, and leave the apartment. That night, just before 2:00 a.m., McLeod observed through her open window, Rowley knock on Robinson's door and say, "Come open the door." After Rowley identified himself, Robinson let him into the apartment. McLeod then heard the volume of the music go up, loud voices, and gunshots. Before noon on the same day, several hours after the murder, Rowley came to the apartment complex and stated to both Taylor and McLeod when he saw them, something to the effect of "You know it wasn't me, right?"

During the trial, Rowley's appointed attorney, Allen Drew, notified the court that he would be suspended from the bar for a year. The suspension would go into effect in thirty days, after the completion of Rowley's trial. The suspension was related to the handling of an escrow account in a bankruptcy case several years earlier. Upon the court's inquiry, Rowley indicated that he was satisfied with Drew's representation. Drew further indicated that the suspension was not unexpected and that it would not compromise his ability to represent Rowley as he was prepared for that possibility. The court then gave Rowley twenty-four hours to confer with his family. The [*5] following day Rowley again talked to Drew and his family. The next morning, Rowley indicated to the court that he had "a great deal of concern" that Drew's ability to represent him adequately might be impaired. In light of Rowley's concern, Drew, finding no other alternative, requested a mistrial. The court denied the motion for a mistrial, finding that Drew could continue to serve as counsel under the circumstances, given that his representation thus far had been effective, Drew's assurances that he would continue to be, and Rowley's own acknowledgment the day before of Drew's adequate representation. The jury ultimately convicted Rowley of Robinson's murder.

Rowley first contends that the court's denial of the motion for replacement of counsel and mistrial violated his Sixth Amendment right to the "the assistance of an attorney unhindered by a conflict of interests." The Sixth Amendment provides a defendant a fair opportunity to secure counsel of his own choice. See *Sampley v. Attorney Gen. of N.C., 786 F.2d 610, 612 (4th Cir. 1986)*. This is not an unlimited right, however, and must not obstruct orderly judicial procedure. See *United States v. Gallop, 838 F.2d 105, 107-08 (4th Cir. 1988)*. [*6] An indigent defendant has no right to have a particular lawyer represent him and can demand a different appointed lawyer only with good cause. See *id. at 108*. We review a claim that the district court erred in denying a motion to replace counsel and a motion for mistrial for abuse of discretion. See *United States v. Kennedy, 32 F.3d 876, 885 (4th Cir. 1994); United States v. Hanley, 974 F.2d 14, 16-17 (4th Cir. 1992)*. In evaluating whether the trial court abused its discretion, we consider the timeliness of the motion, the adequacy of the court's inquiry into the defendant's complaint, and whether the attorney/client conflict was so great that it resulted in a total lack of communication preventing an adequate defense. See *Hanley, 974 F.2d at 17*.

Upon consideration of the relevant factors, we hold that the district court did not abuse its discretion in refusing to grant Rowley's motions for replacement of counsel and a mistrial. We first note that Drew was not under investigation by the same authorities that were prosecuting Rowley. See *Roach v. Martin, 757 F.2d 1463, 1479 (4th Cir. 1985)* (no [*7] actual conflict of interest when attorney was under investigation by State Bar authorities). Drew's suspension was investigated by the Maryland State Bar and Rowley was prosecuted by federal authorities. Drew's suspension was related to a previous bankruptcy case. Second, the trial court conducted an adequate inquiry into the situation by discerning Rowley's satisfaction with Drew's representation up to that point and Drew's own views as to whether he could effectively represent Rowley. Furthermore, there is no evidence in the record of any other disagreement between Rowley and Drew regarding Drew's representation. Under these circumstances, we find no abuse of discretion in the court's denial of Rowley's motions for replacement of counsel and mistrial.

Rowley also contends that the court's admission of substantial propensity evidence and other highly irrelevant and prejudicial evidence violated his due process rights to a fair trial. As a threshold matter, the trial court's evidentiary rulings concerning the admission of evidence pursuant to Fed. R. Evid. 609(a) and Fed. R. Evid. 404(b) or evidence of prior bad acts under Fed. R. Evid. 403 are given great deference and will only [*8] be disturbed if there was an abuse of discretion. See *United States v. Powers, 59 F.3d 1460, 1464-65 (4th Cir. 1995)*, cert. denied, *516 U.S. 1077, 64 U.S.L.W. 3485, 133 L. Ed. 2d 734, 116 S. Ct. 784* (U.S. Jan. 16, 1996) (No. 95-6391); *United States v. Moore, 27 F.3d 969, 974 (4th Cir. 1994); United States v. Russell, 971 F.2d 1098, 1104 (4th Cir. 1992)*. Evidence of prior bad acts is admissible if it is relevant to an issue other than character, is necessary to show an

essential part of the crime or its context, and is reliable. Substantial prejudice must be shown to warrant exclusion. *Powers, 59 F.3d at 1464* (citations omitted). Under Fed. R. Evid. 404(b), evidence of other crimes, wrongs, or acts, is admissible for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Such evidence "is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

The admission of evidence is reviewed for plain error where counsel fails to adequately preserve an objection on the record. [*9] See *United States v. Brewer, 1 F.3d 1430, 1434 (4th Cir. 1993)*. In reviewing for plain error, this court should identify the plain error, consider whether it affected substantial rights and consider whether the fairness, integrity, or public reputation of judicial proceedings was jeopardized. See *United States v. Olano, 507 U.S. 725, 731, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)*.

Rowley first contends that the court improperly admitted testimony of prior bad acts, specifically, alleged threats he made concerning a rival drug dealer referred to as "Man," threats made to an undercover agent, and to a co-conspirator about killing his mother. He maintains that the probative value of this evidence was clearly outweighed by its prejudicial impact. Kevin Wands, a co-conspirator who testified extensively as to Rowley's drug dealings, testified that Rowley told him to kill Man on the spot whenever he saw him. n1 Wands further testified, without objection, that Rowley threatened to kill unknown individuals who stole his truck. Undercover Agent Darren Sanders also testified that Rowley remarked upon how he resembled an individual who stuck up one of his runners [*10] for some drugs and he would kill them if he ever found them, n2 and that Rowley displayed his semiautomatic weapon to intimidate him. Wand's testimony that another co-conspirator, Brandon Holloway, stated that on one occasion he did not take all of the crack because he was afraid Rowley would kill his mother was also admitted. n3

n1 Because the joint appendix omits this page of the transcripts, it is unclear the nature of the objection, if any.

n2 Although defense counsel objected to the admission of this testimony, the basis of the objection is not clear. Furthermore, evidence of these statements had already been previously entered.

n3 While both parties admit in their briefs that the court sustained defense counsel's objection and struck this testimony, that portion of the transcript is omitted from the joint appendix.

We have held that where testimony is admitted as to acts intrinsic to the crime charged, and is not admitted solely to demonstrate bad character, it is admissible. See *United States v. Chin, 83 F.3d 83, 88 (4th Cir. 1996)*. [*11] In Chin, we held that Rule 404(b) does not apply to testimony of bad acts that are an integral part of the defendant's criminal enterprise. Similar to that case, the testimony in question here relating to threats made by Rowley demonstrated that the threat of killing was necessary and inextricably intertwined to the drug business, and thereby intrinsic to the crime charged. See id.

Rowley also challenges the admission into evidence of the details underlying four of his prior convictions, two for distributing crack cocaine and two for assault. We first note that evidence of Rowley's prior convictions, admitted under cross-examination of Rowley, was introduced without objection. Furthermore, the circumstances surrounding those convictions were brought out by Rowley himself in an effort to show that the two drug-related convictions arose out of the same investigation and that the assault convictions arose out of the same incident. We further find that admission into evidence of Row ley's drug convictions as it related to co-conspirator Holloway's and Rowley's drug dealings with a common undercover agent, was relevant because Rowley opened the door to such questioning when he [*12] denied any such involvement with Holloway on direct examination. Under these circumstances, we find that the trial court did not err in admitting testimony concerning Rowley's prior convictions. Moreover, even assuming plain error, we do not find that it affected Rowley's substantial rights. See *United States v. Rhodes, 32 F.3d 867, 871 (4th Cir. 1994)*.

Rowley also contends that the court's admission into evidence of alleged threats he made while in jail regarding Kevin Wands if he cooperated with the Government, and to a jail cellmate Rowley suspected to be a snitch, was prohibited by Fed. R. Evid. 404(b). The court allowed Timothy McCray to testify that while incarcerated Rowley threatened Wands if he chose to cooperate. The court, however, did not permit McCray to mention "death." The prosecution also cross-examined Rowley on the alleged threats. n4 Evidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent under Rule 404(b), if the evidence (1) is related to the offense charged and (2) is reliable. See *United States v. Hayden, 85 F.3d 153, 159 (4th Cir. 1996)*. Because Wands testified extensively on the [*13] nature of the drug conspiracy for which Rowley was also charged and there is no allegation of unreliability, we find no error in the admission of this testimony. Similarly, the prosecution's crossexamination of Rowley concerning threats he made against a jail cellmate he considered to be a snitch did not constitute error because that testimony too related

to Rowley's consciousness of guilt.

n4 Rowley also claims that it was error for the prosecutor to mention "death" concerning Rowley's threats against Wands during crossexamination of Rowley. Because there was no objection and the court's instruction to not mention "death" did not explicitly extend beyond McCray's testimony, we find no error.

Rowley next alleges that the court improperly allowed testimony of alleged threats Rowley made to Robinson's family. On direct examination, Rowley testified that he had had only one argument with Andre Robinson, months before the murder, and expressly denied ever threatening him or his family. As rebuttal evidence, the [*14] prosecu tion introduced the testimony of Robinson's mother, Shirley Robinson-Braithwaite, who testified that four or five months prior to the murder, Andre played back a message off of his beeper of Rowley threatening to kill Andre's mother and brother. She testified that some time thereafter, Rowley apologized to her. On surrebuttal, Rowley gave a different version of the message left on Robinson's beeper.

The admission of rebuttal evidence is well within the sound discretion of the trial court and is not reviewable on appeal absent an abuse of that discretion. See *Hospital Bldg. Co. v. Trustees of Rex Hosp., 791 F.2d 288, 294 (4th Cir. 1986); Williams v. United States, 151 F.2d 736 (4th Cir. 1945).* Given Rowley's opportunity for surrebuttal, and the probative value of the testimony, we find no abuse of discretion in the court's admission of this testimony.

Lastly, Rowley claims that the court erred in admitting testimony, over his objections, of testimony regarding Rowley's propensity for violence towards his girlfriend, also a co-conspirator, and threats he made against her. Relating an incident, Kevin Wands first testified that another individual, [*15] "Nate," told him that Rowley "was punching his girlfriend in the face." The basis for the defense's objection was on hearsay grounds rather than on the grounds that it was propensity evidence. We therefore review Rowley's claim for plain error. Because Wands's testimony established that there was a conspiracy to distribute drugs among Wands, Rowley, and Nate, and that the statements were made in the context of that conspiracy, an offense with which Rowley was charged, we do not find plain error in the admission of the testimony.

Rowley next argues that his girlfriend's testimony that she was afraid of Rowley, n5 that he threatened her life "nine days before [Robinson] was murdered," and that she ultimately had to be treated at a hospital where during a phone call she heard someone in the background saying "they would kill somebody or threaten somebody," was inadmissible. Rowley further alleges that Jackson's testimony and her mother's testimony that Rowley made a death threat against Jackson was improperly admitted over his objections. Jackson served as the defense's key witness and provided Rowley with an alibi. She was also admittedly a co-conspirator in drug distribution with [*16] Rowley. When she testified that she was not afraid of Rowley, the prosecutor asked if Rowley had threatened her in the past, to which she replied she did not recall. No objection was made.

n5 A review of the transcripts does not reveal that an objection was raised to this aspect of her testimony.

Impeachment is an acceptable purpose for the use of evidence of prior bad acts. *United States v. Stockton, 788 F.2d 210, 219 n.15 (4th Cir. 1986).* Here, Jackson, a key witness for the defense denied that Rowley threatened her in the past. It was after her denials that the prosecution refreshed her recollection with police reports to the contrary. n6 A witness's credibility may be impeached by examination with respect to prior statements inconsistent with trial testimony. See Fed. R. Evid. 613. Because Jackson's state of mind and her relationship with Rowley bore directly on her credibility, we find that testimony pertaining to threats Rowley made against her was admissible and reliable.

n6 There was an objection noted on the record when the prosecutor attempted to impeach Jackson with a prior inconsistent statement.

[*17]

In light of the foregoing, we affirm Rowley's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and oral argument would not aid the decisional process.

AFFIRMED

LEXSEE 1999 US Dist LEXIS 1393

TOMMY THOMAS, Petitioner, vs. ANTHONY NEWLAND, Respondent.

No. C-96-0547 MHP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1999 U.S. Dist. LEXIS 1393

February 2, 1999, Decided

February 2, 1999, Filed; February 4, 1999, Entered in Civil Docket

DISPOSITION:
[*1] Thomas petition for writ of habeas corpus DENIED and case DISMISSED in its entirety.

COUNSEL:
TOMMY THOMAS, Plaintiff, Pro se, Vacaville, CA.

For ANTHONY NEWLAND, defendant: Martin S. Kaye, CA State Attorney General's Office, San Francisco, CA.

JUDGES:
MARILYN HALL PATEL, Chief Judge, United States District Court, Northern District of California.

OPINIONBY:
MARILYN HALL PATEL

OPINION:

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Tommy Thomas is a prisoner of the State of California incarcerated at Solano State prison. Thomas brought this *pro se* petition for writ of habeas corpus pursuant to *28 U.S.C. section 2254* to challenge his state court conviction of evading a police officer and unlawfully taking a vehicle, with a prior similar conviction, in violation of California Vehicle Code sections 2800.2 and 10851. On September 8, 1994, petitioner was sentenced to six years in state prison. Petitioner appealed his conviction to the California Court of Appeal, which affirmed the conviction in 1995. He petitioned the California Supreme Court for review of the Court of Appeal's decision, but his petition was denied on January 17, 1996. Petitioner now seeks habeas corpus relief by [*2] raising the following claims: (1) ineffective assistance of counsel and (2) denial of his right to represent himself. By order filed May 22, 1996, this court found petitioner's claims cognizable and ordered respondent to show cause why a writ should not issue. Respondent filed an answer and opposition, and petitioner filed a traverse. This action has been submitted on the papers.

Having considered the parties' arguments and submissions, and for the following reasons set forth below, the court enters the following memorandum and order.

BACKGROUND n1

n1 Unless otherwise indicated, all information in this section is drawn from the State Court Reporter's Transcript ("R.T. at #") submitted by respondent.

Petitioner was arrested on May 19, 1994, after several uniformed police officers identified him as the driver of a stolen car who initiated a high-speed chase reaching up to 100 miles per hour. R.T. 62-64, 150-51, 192, 197, 202, 204. The car had been stolen sometime on or after the evening of May 18, 1994. [*3] R.T. 238-42. The officers found petitioner lying down behind bushes in the location where the chase culminated. R.T. 93-96, 98. Petitioner's fingerprints were not found in the stolen car. R.T. 389. Following his arrest, petitioner stated that he did not commit the crime and stated that he was hiding in the bushes because he was paranoid of the police, having once been bitten by a [police] dog. R.T. 178-80, 182.

Petitioner testified that he spent the night of May 18, 1994, at his girlfriend Bronda Johnson's house and went to work the next day, May 19, 1994, quitting at about 4:00 p.m. R.T. 256-57, 263. Petitioner's mother, Katherine Webb, testified that she last saw petitioner between 9:00 and 10:00 p.m. on May 19, 1994, but did not let him in her house because he appeared "quite high." n2 R.T. 348, 349-50, 352. According to petitioner's testimony, at about 10:45 or 11:00 p.m. he went to Barbara Lawson's house, where he had brief contact with Lawson and Kenny Spencer, and drove home at about 11:00 p.m.

n3 R.T. 246, 255, 280-82, 284.

n2 Lawson's residence is about ten blocks from the location where petitioner was identified prior to the high speed chase. R.T. 242-243.

[*4]

n3 When questioned about his precise activities on May 19, 1994, petitioner responded "it's hard to say." R.T. 259, 270.

In his petition for writ of habeas corpus, petitioner contends that his trial counsel failed to investigate five witnesses, including an alibi witness, and failed to subpoena the witnesses to ensure their presence at trial. Petitioner only named two of these witnesses, Johnson and Lawson, in his petition to the court of appeal, and presented that court with a declaration stating that he requested trial counsel to investigate and subpoena Johnson and Lawson. n4 Respondent's Answer and Opposition at 9. Petitioner also presented Johnson and Lawson's declarations to that court, but their declarations were found to be "confused and contradictory" and to have "undermined rather than strengthened" petitioner's alibi defense. R's Answer at 9.

n4 Citation to Respondent's Answer and Opposition will be in the form "R's Answer at #," and includes exhibit references which have been lodged with the court.

[*5]

The declarations of the three remaining alleged witnesses, Surina Thomas, Spencer and Officer Merson, were only appended to petitioner's petition for review to the California Supreme Court. R's Answer at 10. There is some dispute over whether petitioner informed trial counsel about these alleged witnesses and the nature of their testimony, or that petitioner desired such testimony. n5

n5 Surina Thomas, petitioner's sister, avers that petitioner arrived at her residence on May 19, 1995 at about 10:05 p.m., as she and a friend were leaving, and that petitioner was not there when she returned at 11:30 p.m. (The court notes that there is some dispute about the accuracy of this date, as the crime occurred on May 19, 1994, but it does not affect the court's decision.)

Spencer's declaration avers that he was at Lawson's when petitioner arrived on May 19, 1994 at 11:00 p.m., and that petitioner stayed for a brief time and was driving his own vehicle. Spencer does not say how he knew petitioner was driving his own car.

[*6]

In his habeas petition, petitioner also claims that the trial court denied him the right to self-representation. On August 1, 1994, petitioner filed a *pro per* motion entitled "Motion to be Co-Counsel." The content of the motion stated that petitioner wished to be appointed advisory counsel and averred that petitioner was indigent and could not afford advisory counsel. R's Answer, Exh. A at 69. The same motion also cited to *Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975)*. The court clarified the nature of the motion by asking petitioner if it was a motion to be co-counsel. After confirming that petitioner's request was for co-counsel status, the trial court found that there was no showing on the record that co-counsel status was necessary. R's Answer at 12. On appeal, petitioner contended that the trial court erred in denying the motion without any inquiry because the motion was "alternatively" one for self-representation or self-representation with the assistance of advisory counsel. R's Answer, Exh. B at 7 & n.5. The court of appeal stated that, "it is hard to imagine how a motion which Thomas still characterizes as a motion to be made co-counsel [*7] can be an unequivocal assertion of the right to self-representation." n6

n6 The court of appeal referred to petitioner's sworn declaration in support of his state petition for writ of habeas corpus, which was consolidated with his appeal.

LEGAL STANDARD

The AEDPA amended several provisions of sections 2241-2255 of Title 28 of the United States Code. Although, Congress did not expressly state in the AEDPA that it should not apply to habeas actions already pending in federal court prior to its effective date, the intent not to apply the AEDPA retroactively to non-capital habeas petitions can be negatively implicated from provisions expressly applying the AEDPA retroactively to capital habeas petitions. See *Lindh v. Murphy, 521 U.S. 320, 327, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997)*; cf. *Jeffries v. Wood, 114 F.3d 1484, 1495 (9th Cir. 1997)* (en banc) (finding no need to resort to negative inference because "a plain reading of section 107(c), coupled with the normal presumption of prospectivity, [*8] leads to the conclusion that the [] amendments do not apply to pending cases"), cert. denied, *522 U.S. 1008, 139 L. Ed. 2d 423, 118 S. Ct. 586 (1997)*. Consequently, the AEDPA does not apply to cases pending in the federal courts prior to its effective date of April 24, 1996. See *Lindh, 521 U.S. at 336-37*. Petitioner filed his habeas petition in federal court on February 12, 1996, approximately two months before the AEDPA took effect; therefore, review of his petition is

governed by the previous standard.

The pre-AEDPA habeas standard authorizes this court to review a state court criminal conviction "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." *28 U.S.C. § 2254*(a) (West 1996). n7 Because federal habeas review delays finality and burdens state-federal relations, habeas review must balance the protection the writ offers from unlawful custody against "the presumption of finality and legality" that attaches to a state-court conviction after direct review. See *Brecht v. Abrahamson, 507 U.S. 619, 635-37, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993); McCleskey v. Zant, 499 U.S. 467, 490-91, 113 L. Ed. 2d 517,* [*9] *111 S. Ct. 1454 (1990).*

n7 Hereinafter all references to *28 U.S.C. § 2254* refer to the statute as it existed prior to the AEDPA.

Accordingly, a federal habeas court must in most cases presume that the state court findings of fact are correct. See *28 U.S.C. § 2254*(d). In contrast, purely legal questions and mixed questions of law and fact are reviewed de novo. See *Swan v. Peterson, 6 F.3d 1373, 1379 (9th Cir. 1993),* cert. denied, *513 U.S. 985, 115 S. Ct. 479, 130 L. Ed. 2d 393 (1994).* The precise showing required to establish a constitutional violation—and the placement of the burdens of production and proof—depends on the specific claim.

DISCUSSION

A. Ineffective Assistance of Counsel

In a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a fact binding on the federal court to the extent stated by section 2254(d). A petitioner claiming ineffective assistance of counsel must establish both deficient performance [*10] by counsel and prejudice to the outcome of his case. See *Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).* Both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. See *id. at 698.* Claims of ineffective assistance therefore require a review of the record.

The Sixth Amendment guarantees not only assistance, but effective assistance of counsel. See *Strickland, 466 U.S. at 687.* The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. See id. To prevail on a claim of ineffective assistance of counsel, petitioner must meet both prongs of the Strickland test. *Id. at 687.*

Petitioner claims that counsel's failure to call the five witnesses—Surina Thomas, Lawson, Johnson, Officer Merson, and Spencer—constituted ineffective assistance of counsel. Because the court finds that petitioner failed to show how counsel's omission here constitutes prejudice under the Strickland test, the court will not reach [*11] the question of counsel's deficiency. *Id. at 697; Williams v. Calderon, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995)* cert. denied, *516 U.S. 1124, 133 L. Ed. 2d 863, 116 S. Ct. 937 (1996)*(approving district court's refusal to consider whether counsel's conduct was deficient after determining that petitioner could not establish prejudice).

The test for prejudice is not outcome-determinative, i.e., petitioner need not show that the deficient conduct more likely than not altered the outcome of the case; however, a simple showing that the defense was impaired is also not sufficient. See *Strickland, 466 U.S. at 693.* Petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *id. at 694.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *id. at 694;* see, e.g., *Brown v. Myers, 137 F.3d 1154, 1157 (9th Cir. 1998)*(failure to investigate and present available alibi witnesses prejudicial where, without corroborating witnesses, defendant's bare testimony left him without a defense). n8

n8 Petitioner's case can be distinguished from the facts in Brown because Brown's seven alibi witnesses would have conclusively placed him at another location, whereas petitioner's alibi witnesses cannot account for his whereabouts at the critical time of the crime. See *Brown, 137 F.3d at 1156-57.*

[*12]

The court finds that counsel's failure to call the five witnesses indicated by petitioner did not prejudice the outcome of petitioner's case. The potential contributions of these five witnesses fail to sufficiently strengthen the defense case. With or without these witnesses, it is likely that the outcome would have been the same; therefore, no prejudice resulted under *Strickland. 466 U.S. at 694.*

For example, Surina Thomas' declaration places petitioner at her residence at 10:05 p.m. on the night of the incident, and otherwise she cannot account for his whereabouts; she offers no alibi for petitioner "around eleven o'clock" when the crime took place. Surina Thomas Dec. at 1; R.T. 60. Johnson and Lawson likewise offer no alibi for the minutes during which the crime occurred. Johnson Dec. at 1; Lawson Dec. at 1. Lawson places Thomas at

her residence "at about 11:00 p.m." on the night of his arrest, shortly before the chase began. Lawson Dec. at 1. Lawson's declaration serves merely to place Thomas in a car in the vicinity immediately after 11:00 p.m. Johnson's declaration does not account for petitioner's whereabouts on either the night of the crime or on the night the Oldsmobile [*13] was stolen. Johnson Dec. at 1.

Officer Merson, the fingerprint technician, would have testified that petitioner's fingerprints were not found in the stolen car. This testimony would have been largely cumulative given that the prosecution presented evidence that the police dusted for prints but offered no evidence that petitioner's prints were found. R.T. 126. In addition, during closing argument, the prosecution conceded that no prints matching petitioner's were recovered in the car. R.T. 389. Furthermore, Officer Lum's testimony that failure to recover prints in a car is not unusual would have undermined the probative value of petitioner's fingerprint evidence. R.T. 129.

Finally, Spencer is the only witness whose testimony might have aided petitioner's defense. In his declaration Spencer placed petitioner in petitioner's own car near the time of the crime, not the stolen Oldsmobile. Spencer Dec. at 1. Nonetheless, even if Spencer presented credible testimony regarding petitioner's vehicle, his statement is not enough to meet the standard in Strickland. Petitioner is required to show that but for counsel's error, it is reasonably likely that the outcome would have been different. [*14] See *Strickland, 466 U.S. at 694.* Here, the state offered testimony of several police officers who identified petitioner as the man in the Oldsmobile. R.T. 62-64, 150-51, 192, 197, 202, 204. Furthermore, petitioner was discovered by police hiding among bushes in the path of the driver's flight. R.T. 93-96, 98. In light of this evidence, counsel's failure to present Spencer's testimony does not meet the prejudice prong of Strickland. n9

> n9 If this court should find that failure to present Spencer's testimony borders on prejudice to petitioner, it is nevertheless unlikely that counsel's failure to call Spencer meets the deficiency prong of Strickland. Petitioner has presented no evidence that he informed his counsel of Spencer's existence or requested his testimony.

B. Denial of the Right to Self-Representation

Petitioner claims that his "Motion to be Co-counsel" should have been treated as an assertion of the right to self-representation. Under section 2254(d), a federal court reviews *de novo* [*15] a state court's determination of a valid Sixth Amendment waiver, but the state court's findings of historical and subsidiary facts which underlay this determination are entitled to a presumption of correctness. See *Wells v. Maass, 28 F.3d 1005, 1011 (9th Cir. 1994).* Courts may indulge in every reasonable presumption against waiver of the right to counsel. See *United States v. Meeks, 987 F.2d 575, 579 (9th Cir. 1993),* cert. denied, *510 U.S. 919, 126 L. Ed. 2d 261, 114 S. Ct. 314 (1993).*

There is no constitutional basis for granting petitioner's motion for co-counsel status. See *McKaskle v. Wiggins, 465 U.S. 168, 183, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984).* To effectively waive the right to counsel, and thus assert the right of self-representation, a defendant must act "knowingly and intelligently; he must be aware of the nature of the charges against him, the possible penalties, and the dangers ad disadvantages of self-representation." See *Faretta v. California, 422 U.S. 806, 835, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975); Meeks, 987 F.2d at 579.* The request to represent himself must be unequivocal. See *Meeks v. Craven, 482 F.2d 465, 467 (9th Cir. 1973);* [*16] accord *Armant v. Marquez, 772 F.2d 552, 555 (9th Cir. 1985),* cert. denied, *475 U.S. 1099 (1986).* If a defendant equivocates, he is presumed to have requested the assistance of counsel. See *Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989).*

A defendant may of course also choose to be represented by an attorney; however, a "defendant does not have a constitutional right to 'hybrid' representation" at trial. See *McKaskle, 465 U.S. at 183; United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994).* He or she therefore has no absolute right to serve as co-counsel after electing to be represented by counsel. Although the Supreme Court has noted that it may be wise to appoint standby counsel for a defendant who wishes to waive representation by counsel, a defendant has no constitutional right "to represent himself and have access to 'advisory' or 'consultative' counsel at trial." See *Kienenberger, 13 F.3d at 1356.*

A defendant's so-called Faretta motion cannot be construed as a motion for self-representation if the motion includes a request for co-counsel status or appointment of advisory counsel. See id. Petitioner's *pro per* motion was captioned [*17] as "Motion to be co-counsel." The trial court clarified the petitioner's request by confirming orally that it was indeed a request to be made co-counsel. Although petitioner cited Faretta in his motion, his request was clearly not to conduct his own defense, but to be given the status of co-counsel; therefore, petitioner never conclusively relinquished his right to representation by counsel. The trial court's denial of the motion was not error. Taking into account the United State Supreme Court's holding in *Haines v. Kerner, 404 U.S. 519, 520-*

21, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972), that a complaint by a pro se plaintiff must be held to "less stringent standards than formal pleadings drafted by lawyers" this court nonetheless finds that petitioner's motion for co-counsel status does not meet the unequivocality requirement of Faretta.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that the petition for writ of habeas corpus is DENIED. This order fully adjudicated the motion reflected at Docket # 1 and the Clerk of the Court shall remove it from the pending motions list.

IT IS SO ORDERED.

Dated: 2-2-99

MARILYN HALL PATEL

Chief Judge

United [*18] States District Court

Northern District of California

JUDGMENT

Fed. R. Civ. Proc. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed,

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus submitted by TOMMY THOMAS is DENIED, and this action brought by TOMMY THOMAS is dismissed in its entirety.

IT IS SO ORDERED.

Date: 2-2-99

MARILYN HALL PATEL

Chief Judge

United States District Court

Northern District of California

LEXSEE 1999 U.S. App. LEXIS 2049

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES EDWARD ELLERBE, a/k/a Jim, a/k/a Ed, Defendant-Appellant.

No. 98-4058

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1999 U.S. App. LEXIS 2049

January 12, 1999, Submitted

February 11, 1999, Decided

NOTICE:
[*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY:
Reported in Table Case Format at: *1999 U.S. App. LEXIS 11468.*

PRIOR HISTORY:
Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (CR-97-100).

DISPOSITION:
AFFIRMED.

COUNSEL:
J. Randolph Riley, J. RANDOLPH RILEY LAW FIRM, Raleigh, North Carolina, for Appellant.

Janice McKenize Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, John S. Bowler, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

JUDGES:
Before LUTTIG, HAMILTON, and TRAXLER, Circuit Judges.

OPINION:

OPINION

PER CURIAM:

James Ellerbe appeals his conviction and sentence following his guilty plea to aiding and abetting the conspiracy to possess with the intent to distribute and the distribution of cocaine base in violation of *18 U.S.C. § 2* (1994), and *21 U.S.C. § 846* (1994). We affirm.

Ellerbe asserts that the district court erred in denying his motion to withdraw his guilty plea. This court reviews the district court's denial of Ellerbe's motion to withdraw his guilty plea for an abuse of discretion. [*2] See *United States v. Craig, 985 F.2d 175, 178 (4th Cir. 1993).* A defendant does not have an absolute right to withdraw a guilty plea, see *United States v. Ewing, 957 F.2d 115, 119 (4th Cir. 1992),* but must present a "fair and just" reason. See Fed. R. Crim. P. 32(e). A "fair and just reason" is one that "essentially challenges ... the fairness of the Rule 11 proceeding." *United States v. Lambey, 974 F.2d 1389, 1394 (4th Cir. 1992).* An appropriately conducted proceeding pursuant to Fed. R. Crim. P. 11 raises a strong presumption that the guilty plea is final and binding. Id. A district court should consider the following factors in determining whether to allow a defendant to withdraw his plea: (1) whether there has been a delay between the guilty plea and the motion to withdraw; (2) whether the defendant has had the assistance of competent counsel; (3) whether the defendant has made a credible assertion of legal innocence; (4) whether there is credible evidence that the guilty plea was not knowing and voluntary; and (5) whether withdrawal will prejudice the government or will cause inconvenience to the court and waste judicial resources. See *United States v.* [*3] *Moore, 931 F.2d 245, 248 (4th Cir. 1991).* The defendant bears the burden of establishing a fair and just reason even if no prejudice to the government is shown. See *Lambey, 974 F.2d at 1393-94.*

Application of the above factors supports the district court's refusal to allow Ellerbe to withdraw his guilty plea. Ellerbe waited approximately six weeks after pleading guilty before filing his motion. His motion did not challenge the fairness of his Rule 11 hearing or make an assertion of legal innocence, but instead focused on

allegations that counsel tricked and pressured him into pleading guilty. At his plea hearing, however, Ellerbe had assured the district court that he was pleading guilty of his own free will and that he was completely satisfied with counsel's performance. Therefore, his subsequent protests about a deteriorating relationship with counsel were insufficient to satisfy his burden of establishing a fair and just reason for withdrawing his guilty plea, and the district court acted within its discretion in denying his motion.

Ellerbe next contends that the district court erred by denying his motion to replace counsel. "A defendant's right to have a lawyer of his [*4] or her own choosing is an essential element of the Sixth Amendment right to assistance of counsel." *United States v. Mullen, 32 F.3d 891, 895 (4th Cir. 1994).* The individual's right to have counsel of his choosing, however, is not an absolute right. See id. Rather, the right is circumscribed by the need for the orderly administration of justice. The exercise of the right to counsel of choice may neither "obstruct orderly judicial procedure" nor "deprive courts of the exercise of their inherent power to control the administration of justice." *United States v. Gallop, 838 F.2d 105, 108 (4th Cir. 1988).*

The denial of a motion to substitute counsel is reviewed under an abuse of discretion standard. See id. To determine whether the district court abused its discretion, courts generally consider three factors: (1) the timeliness of the motion; (2) the adequacy of the court's inquiry into the defendant's complaint; and (3) whether a total breakdown in attorney/client communication had developed such that it prevented the attorney from putting forth an adequate defense. See *Mullen, 32 F.3d at 895.* However, "[a] request for change in counsel cannot be considered justifiable [*5] if it proceeds from a transparent plot to bring about delay." *United States v. Hanley, 974 F.2d 14, 17 (4th Cir. 1992)* (quoting *Gallop, 838 F.2d at 108);* see also *United States v. Burns, 990 F.2d 1426, 1438 (4th Cir. 1993).*

We find that the district court's thorough inquiry into Ellerbe's dissatisfaction with counsel and its consequent finding that Ellerbe's requests to relieve counsel were a manipulative tactic, provided it with a sufficient basis to deny Ellerbe's motion. See *Hanley, 974 F.2d at 17.* Ellerbe's failure to show prejudice resulting from any breakdown of communication between him and counsel provides further support for the district court's decision and defeats any alleged violation of his Sixth Amendment rights.

Ellerbe's contradictory testimony about his satisfaction with counsel and his inability to articulate substantive fault with counsel's services support the district court's finding that Ellerbe's repeated requests for substitute counsel were a manipulative tactic. At Ellerbe's plea hearing, the district court questioned Ellerbe about his dissatisfaction with counsel. When faced with the district court's unwillingness to accept his guilty plea [*6] on this basis, Ellerbe abandoned any pretense of dissatisfaction with counsel's services and assured the court that he was freely and voluntarily pleading guilty. One month later, Ellerbe did another about-face and filed a motion to replace counsel in which he again launched conclusory allegations about counsel's deficient performance. In rejecting this motion the district court heard Ellerbe and Miller's testimony and discredited Ellerbe's assertion that Miller pressured him to lie at his plea hearing. The sincerity of Ellerbe's claimed dissatisfaction with counsel is further undermined by Ellerbe's decision to decline the district court's offer to grant him a continuance so that he could present his objections with the aid of the probation officer's independent review.

The record further suggests that any breakdown of communication between Ellerbe and counsel did not prevent counsel from adequately representing Ellerbe at sentencing. Counsel filed written objections and a sentencing memorandum on Ellerbe's behalf, and competently argued the objections to the district court. He was successful in defeating the government's objection to the two level decrease based on Ellerbe's minimal [*7] role in the offense. Moreover, on appeal Ellerbe asserts only that the communication breakdown between him and counsel made an adequate defense "unlikely," but does not assert that he suffered prejudice from counsel's representation.

In light of the district court's finding that Ellerbe's expressions of dissatisfaction with counsel was an attempt to manipulate the court and the lack of any prejudice suffered from counsel's continued representation, the district court did not err in refusing to award Ellerbe new counsel.

Ellerbe's final claim is that the district court erred in attributing 1.5 kilograms of cocaine to him for sentencing purposes. The government has the burden of proving by a preponderance of the evidence sentencing factors, including the type and quantity of drugs for which a defendant should be held accountable. See *United States v. Estrada, 42 F.3d 228, 231 (4th Cir. 1993).* In proving these factors, the government may rely upon information found in a defendant's presentence report unless the defendant affirmatively shows that such information is inaccurate or unreliable. See *United States v. Gilliam, 987 F.2d 1009, 1014 (4th Cir. 1993).* Drug quantities attributable [*8] to persons convicted of conspiring to distribute illegal drugs are determined by examining "the quantity of narcotics reasonably foreseeable to each conspirator within the scope of his agreement." *United States v. Irvin, 2 F.3d 72, 78 (4th Cir. 1993);* see also U.S. Sentencing

Guidelines Manual § 1B1.3(a)(1)(B) (1996). We review the district court's findings on the amount of drugs for clear error. *United States v. McDonald, 61 F.3d 248, 255 (4th Cir. 1995).*

Ellerbe's presentence report recommended holding him responsible for 1.5 kilograms of cocaine because the protection and information he afforded his coconspirators enabled them to distribute over fourteen kilograms of cocaine during the course of the conspiracy. Ellerbe did not present evidence challenging the accuracy of this amount. The government, however, presented evidence that in the six years the conspiracy existed Ellerbe had actual and constructive knowledge that the drug dealers he was protecting sold far more than 1.5 kilograms of cocaine. One of Ellerbe's coconspirators admitted to selling as much as twelve kilograms during the course of the conspiracy, while another admitted to selling over ten kilograms. **[*9]** On one occasion Ellerbe discussed with a coconspirator the possibility of personally purchasing a kilogram of cocaine. This evidence and the substantial payments Ellerbe received from his coconspirators support the district court's finding that Ellerbe could have reasonably foreseen the distribution of 1.5 kilograms of cocaine during the course of the conspiracy.

We therefore affirm Ellerbe's conviction and sentence. We further deny Ellerbe's motion to supplement the record on appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument could not aid the decisional process.

AFFIRMED